

Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000102
20-MAY-2016
08:11 AM

NO. CAAP-15-0000102

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF
OF THE HOLDERS OF THE ASSET BACKED SECURITIES CORPORATION
HOME EQUITY LOAN TRUST, SERIES AMQ 2006-HE7 ASSET BACKED
PASS-THROUGH CERTIFICATES, SERIES AMQ 2006-HE7,
Plaintiff-Appellee,

v.

MONICA EWALANI BERNARDINO,
Defendant-Appellant,

and

ASSOCIATION OF APARTMENT OWNERS OF THE ARBORS,
EWA BY GENTRY COMMUNITY ASSOCIATION,
HAWAIIAN TEL FEDERAL CREDIT UNION,
Defendants-Appellees,

and

JOHN and MARY DOES 1-20, DOE PARTNERSHIPS,
CORPORATIONS OR OTHER ENTITIES 1-20, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-0841)

MEMORANDUM OPINION

(By: Foley, Presiding J., Fujise and Ginoza, JJ.)

Defendant-Appellant Monica Ewalani Bernardino
(Bernardino) appeals pro se from the "Order Denying
[Bernardino's] Motion; [Hawaii Rules of Civil Procedure (HRCP)],
Rule 59. New Trials; Amendment of Judgment; and From Judgment,
Notice of Entry of Judgment Entered; 6/23/2014; and HRCP, Rule
60. Relief from Judgment or Order; From Judgment, Notice of Entry

of Judgment Entered 6/13/2012," entered on January 26, 2015 in the Circuit Court of the First Circuit¹ (**circuit court**).

On appeal, Bernardino contends the circuit court erred in denying her relief pursuant to HRCF Rule 60(b)(4)² because the circuit court's judgment confirming the sale of the foreclosed property is (1) "void for lack of service of Complaint and Summons" and (2) void where the motion for summary judgment of Plaintiff-Appellee U.S. Bank National Association, as Trustee, on Behalf of the Holders of the Asset Backed Securities Corporation Home Equity Loan Trust, Series AMQ 2006-HE7 Asset Backed Pass-Through Certificates, Series AMQ 2006-HE7 (**U.S. Bank**) was "not properly supported [as it contained] [n]o written authority for Agent executing Assignment of Mortgage." Bernardino also argues that the circuit court erred in denying her relief pursuant to HRCF Rule 59(e)³ because (1) the judgment confirming the sale of

¹ The Honorable Bert I. Ayabe presided.

² HRCF Rule 60(b) provides, in relevant part:
Rule 60. RELIEF FROM JUDGMENT OR ORDER.

.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

³ HRCF Rule 59(e) provides:
Rule 59. NEW TRIALS; AMENDMENT OF JUDGMENTS.

.

(continued...)

the foreclosed property is "void for lack of service of complaint and summons" and (2) U.S. Bank was not entitled to a writ of ejectment when it did not request such relief in its Complaint.⁴

I. BACKGROUND

On August 11, 2006, Bernardino executed a promissory note (**Note**) to Argent Mortgage Company, LLC (**Argent**) for the principal sum of \$352,500. As security for the Note, Bernardino executed a mortgage (**Mortgage**) on the subject property (**Property**) in favor of Argent as mortgagee. The Note and Mortgage were assigned to U.S. Bank through an Assignment of Mortgage (**AOM**) dated August 18, 2006. The AOM was recorded in the Office of the Assistant Registrar of the Land Court of the State of Hawaii on June 21, 2007.

On April 28, 2011, U.S. Bank filed its "Complaint to Foreclose Mortgage" (**Complaint**), which sought to foreclose on the Property because Bernardino defaulted on her scheduled Mortgage payments. A Return and Acknowledgment of Service (**Return of Acknowledgment**), filed on May 11, 2011, indicates that U.S. Bank personally served Bernardino with a copy of the Complaint on May 6, 2011. Bernardino failed to answer, plead, or otherwise defend against U.S. Bank's Complaint, so on June 20, 2011, the circuit court clerk entered default against Bernardino pursuant to HRCF Rule 55(a).⁵

³(...continued)

(e) Motion to alter or amend judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

⁴ To aid in the clarity of this opinion, we have altered the order in which we address Bernardino's points on appeal.

⁵ HRCF Rule 55(a) provides:

Rule 55. DEFAULT.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

On February 15, 2012, U.S. Bank filed "[U.S. Bank's] Motion for Summary Judgment, and for Interlocutory Decree of Foreclosure Against All Parties" (**MSJ**). On February 28, 2012, Bernardino filed her opposition to U.S. Bank's MSJ. On June 13, 2012, the circuit court granted U.S. Bank's MSJ in its "Findings of Fact; Conclusions of Law; Order Granting [U.S. Bank's] Motion for Summary Judgment, and for Interlocutory Decree of Foreclosure Against All Parties" (**FOF/COL**), thereby foreclosing on the Property and appointing a commissioner (**Commissioner**) to oversee the sale of the Property. The circuit court entered its judgment for the decree of foreclosure on the same day (**Judgment**).

On January 21, 2014, the Commissioner conducted a public auction of the Property in which U.S. Bank was the highest bidder. On January 27, 2014, Bernardino filed a motion to dismiss U.S. Bank's Complaint pursuant to HRCF Rule 12(b)(1) (**Motion to Dismiss**). Bernardino argued that the circuit court lacked subject matter jurisdiction over the initial foreclosure action. On February 20, 2014, U.S. Bank filed "[U.S. Bank's] Motion for Confirmation of Sale, Distribution of Proceeds, and for Writ of Ejectment." On March 28, 2014, U.S. Bank filed its opposition to Bernardino's HRCF Rule 12(b)(1) Motion to Dismiss.

On June 23, 2014, the circuit court entered orders granting U.S. Bank's motion for confirmation of sale and writ of ejectment (**Order Confirming Sale/Writ of Ejectment**) and denying Bernardino's HRCF Rule 12(b)(1) Motion to Dismiss. The circuit court entered a writ of ejectment against Bernardino on the same day.

On July 3, 2014, Bernardino moved for relief from the circuit court's FOF/COL, Judgment, and Order Confirming Sale/Writ of Ejectment pursuant to HRCF Rule 59(e) and HRCF Rule 60(b)(4) (**Motion for Relief**). In her Motion for Relief, Bernardino argued that she was entitled to relief under HRCF Rule 60(b)(4) because the circuit court's FOF/COL and Judgment were void where (1) service of process was insufficient and (2) the documents U.S. Bank attached to its MSJ did not support summary judgment. Bernardino also argued that she was entitled to relief under HRCF

Rule 59(e) because the circuit court erred in (1) entering its Order Confirming Sale/Writ of Ejectment when service of U.S. Bank's Complaint and summons was improper and (2) issuing U.S. Bank's writ of ejectment where U.S. Bank's "[Complaint did] not request a Writ of Possession or Writ of Ejectment" and where such relief was "not authorized by the [circuit court's Order Confirming Sale/Writ of Ejectment.]" U.S. Bank filed its opposition to Bernardino's Motion for Relief on December 1, 2014.

The circuit court held a hearing on the Motion for Relief on December 9, 2014 and entered an order denying the motion on January 26, 2015. Bernardino filed her notice of appeal on February 25, 2015.

II. STANDARD OF REVIEW

A. HRCF Rule 60(b)

"The circuit court's disposition of an HRCF Rule 60(b) motion is reviewed for abuse of discretion." Beneficial Hawai'i, Inc. v. Casey, 98 Hawai'i 159, 164, 45 P.3d 359, 364 (2002).

The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

Id. (quoting Molinar v. Schweizer, 95 Hawai'i 331, 335, 22 P.3d 978, 982 (2001)).

HRCF Rule 60(b)(4) relief requires the trial court to determine whether a judgment is void. HRCF Rule 60(b)(4). Because such a determination is not a discretionary issue, we review the trial court's determination that a judgment is void de novo. Cvitanovich-Dubie v. Dubie, 125 Hawai'i 128, 139, 254 P.3d 439, 450 (2011); Wagner v. World Botanical Gardens, Inc., 126 Hawai'i 190, 195, 268 P.3d 443, 448 (App. 2011).⁶

⁶ We note that HRCF Rule 60(b) is substantially similar to Hawai'i Family Court Rules Rule 60(b) and materially similar to the Federal Rules of Civil Procedure (FRCP) Rule 60(b). Wagner, 126 Hawai'i at 194 n.3, 268 P.3d at 447 n.3. This court has held that "treatises and cases interpreting HRCF Rule 60(b) and FRCP Rule 60(b) are persuasive for purposes of interpreting HRCF Rule 60(b)." Id.; see Cvitanovich-Dubie, 125 Hawai'i at 147 n.23, 254 P.3d at 458 n.23 (2011).

B. HRCP Rule 59(e)

A motion made pursuant to HRCP Rule 59(e) to alter or amend the judgment is reviewed under the abuse of discretion standard. Gossinger v. Ass'n of Apartment Owners of the Regency of Ala Wai, 73 Haw. 412, 425, 835 P.2d 627, 634 (1992).

III. DISCUSSION

A. HRCP Rule 60(b)

Bernardino contends the circuit court erred in denying her Motion for Relief because she was entitled to relief under HRCP Rule 60(b)(4). A motion made pursuant to HRCP Rule 60(b)(4) "differs from the other five clauses of [HRCP Rule 60]" in that "[i]t does not involve a question of judicial discretion, does not require the moving party to show a meritorious defense, and is not restricted by a reasonable time requirement." Calasa v. Greenwell, 2 Haw. App. 395, 397, 633 P.2d 553, 555 (1981); see 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d § 2862, at 431-33 (2012) (noting that the "reasonable time" requirement cannot be enforced with regard to a Rule 60(b)(4) motion, although it "seems literally to apply to motions under Rule 60(b)(4)"). HRCP Rule 60(b)(4) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void[.]" "A judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." Wagner, 126 Hawai'i at 195, 268 P.3d at 448 (quoting In re Genesys Data Techs., Inc., 95 Hawai'i 33, 38, 18 P.3d 895, 900 (2001)).

First, Bernardino argues that the circuit court's June 13, 2012 FOF/COL and Judgment are void because of insufficient service of process. "In order for a trial court to exercise personal jurisdiction over a defendant, the defendant must be served with a copy of the summons and the complaint pursuant to HRCP Rule 4(d)." Wagner, 126 Hawai'i at 195, 268 P.3d at 448

(quoting Citicorp Mortg., Inc. v. Bartolome, 94 Hawai'i 422, 430, 16 P.3d 827, 835 (App. 2000)). HRCP Rule 4(d) provides:

Rule 4 PROCESS.

.

(d) **Same: Personal service.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, (A) by delivering a copy of the summons and of the complaint to the individual personally or in case the individual cannot be found by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or (B) by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

The defense of insufficient service of process can be waived. Cf. Rearden Family Tr. v. Wisenbaker, 101 Hawai'i 237, 247, 65 P.3d 1029, 1039 (2003).

The Return of Acknowledgment indicates that Bernardino was personally served a copy of the Complaint and summons on May 6, 2011, but contains no signature on the line stating "signature of person served." An affidavit of the independent process server (**Process Server**) who purportedly served Bernardino, indicates that he served Bernardino on May 6, 2011 at the Property. The affidavit states:

Once at address, I approached a woman at her garage door, and asked her if her name was Monica Bernardino. That person unknown at that time did not confirm or, deny if she was Monica Bernardino but received the summons, and walked away back into her garage without any further acknowledgment. A male individual was also observed in the garage area.

Multiple attempts in the past have been made, and were unsuccessful. That same individual was observed on multiple occasions at the residence through kitchen window with no reply when attempted service through front door.

Bernardino claimed she was not home when the purported service occurred and, therefore, service could not have happened as the Process Server recalled. We note that "[t]he weight and credibility of evidence is for the circuit court to determine and its findings of fact will not be set aside unless they are clearly erroneous." Beneficial Hawaii, Inc., 98 Hawai'i at 167,

45 P.3d at 367 (refusing to disturb the circuit court's finding that defendant was properly served with plaintiff's motion for summary judgment where defendant "offer[ed] no argument for why the circuit court's finding is clearly erroneous").

Even if assuming arguendo service was improper, Bernardino waived her insufficient service of process argument when she filed multiple responses and motions, including an HRCP Rule 12(b)(1) motion to dismiss complaint, during the circuit court proceedings without challenging U.S. Bank's service of process. HRCP Rule 12 provides, in pertinent part:

Rule 12. DEFENSES AND OBJECTIONS -- WHEN AND HOW PRESENTED
-- BY PLEADING OR MOTION -- MOTION FOR JUDGMENT ON THE PLEADINGS.

.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

.

(g) Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or preservation of certain defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(Emphases added.) The defense of insufficient service of process is waived if omitted from a pre-answer motion or responsive pleading. HRCF Rule 12(h)(1)(A); see 5C Wright & Miller, Federal Practice and Procedure: Civil 3d § 1391, at 515 (2004) ("If [a] party wishes to raise any of these [Rule 12] defenses, that must be done at the time the first significant defensive move is made--whether it be by way of a Rule 12 motion or a responsive pleading."). The Hawai'i Supreme Court has maintained:

Any time defendant makes a pre-answer Rule 12 motion, he or she must include, on penalty of waiver, the defenses set forth in subdivisions (2) through (5) of Rule 12(b). If one or more of these defenses are omitted from the initial motion but were "then available" to the movant, they are permanently lost. Not only is defendant prevented from making it the subject of a second preliminary motion but he or she may not even assert the defense in his or her answer.

Rearden, 101 Hawai'i at 247, 65 P.3d at 1039 (brackets and emphasis omitted) (quoting 5A Wright & Miller, Federal Practice & Procedure: Civil § 1391, at 744 (2d ed. 1990)).⁷

On January 27, 2014, Bernardino filed her Motion to Dismiss the Complaint for lack of subject matter jurisdiction pursuant to HRCF Rule 12(b)(1), which the circuit court considered and then denied on June 10, 2014. Bernardino's Motion to Dismiss did not include her HRCF Rule 12(b)(5) insufficient service of process defense.

Therefore, under HRCF Rule 12(h)(1)(A), Bernardino waived her challenge to the sufficiency of service of process.⁸ See Rearden, 101 Hawai'i at 248, 65 P.3d at 1040 (holding that, pursuant to HRCF Rule 12(h)(1)(A), defendant waived his HRCF Rule 12(b)(2) lack of personal jurisdiction defense where he omitted the defense from his pre-answer motion to dismiss based on HRCF

⁷ HRCF Rules 12(b), (g), and (h) are substantively similar to FRCP Rules 12(b), (g), and (h). "Where we have patterned a rule of procedure after an equivalent rule within the FRCP, interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this court." Rearden, 101 Hawai'i at 247, 65 P.3d at 1039 (quoting Gold v. Harrison, 88 Hawai'i 94, 105, 962 P.2d 353, 364 (1998)).

⁸ Because we hold that Bernardino waived her HRCF Rule 12(b)(5) insufficient service of process defense by failing to include it in her January 27, 2014 Motion to Dismiss, we need not determine if Bernardino also waived her defense at an earlier point in the lower court proceedings.

Rule 12(b)(5) insufficiency of service and HRCF Rule 12(b)(6) failure to state a claim defenses); Roxas v. Marcos, 89 Hawai'i 91, 135, 969 P.2d 1209, 1253 (1998) ("[N]otwithstanding that the defense of lack of personal jurisdiction was asserted in the [defendant-appellant's] answer to the plaintiffs-appellees' complaint, . . . the [defendant-appellant's] failure to assert [their personal jurisdiction defense] in their motion to dismiss constitutes a waiver of the issue pursuant to HRCF Rule 12(g) and (h)."); see also 5B Wright & Miller, Federal Practice and Procedure: Civil 3d § 1353, at 340 (2004) ("[I]f a motion is made asserting any of the defenses listed in Rule 12(b), any objection to process must be joined in that motion or it will be deemed waived.").

Second, Bernardino argues that the FOF/COL and Judgment are void because "[U.S. Bank] and its counsel submitted documents to the [circuit] court with false statements to obtain the Judgment of Foreclosure." Specifically, Bernardino argues that the circuit court erred in granting U.S. Bank's MSJ because U.S. Bank did not provide "written documentation" proving that Argent's agent who signed the AOM, Michael Powell (**Powell**), had the authority to assign the Mortgage.

Typically, mortgagors lack standing to challenge the validity of the assignment of their mortgages where they are not parties to the agreement, unless the "challenge would deem the assignment void, not voidable." U.S. Bank Nat'l Ass'n v. Salvacion, 134 Hawai'i 170, 175, 338 P.3d 1185, 1190 (App. 2014)). Courts have previously held that a successful challenge to a person or entity's authority to assign loan documents only renders the assignment voidable. See Paik-Apau v. Deutsche Bank Nat'l Tr. Co., 2012 WL 5207495, at *5 (D. Haw. Oct. 19, 2012) (contrasting void and voidable contracts, while holding that "[mortgagor's] challenges to the assignments of her loan go to whether those assignments are voidable, as she argues that persons or entities lacked authority to assign the loan documents"); see also Salvacion, 134 Hawai'i at 175-76, 338 P.3d at 1190-91. Because Bernardino was not a party to the AOM and

because her arguments challenging Powell's authority would only render the AOM voidable, she does not have standing to challenge the AOM and her argument is without merit.

The FOF/COL and Judgment are, therefore, not void and the circuit court did not err in determining that Bernardino was not entitled to HRCF Rule 60(b)(4) relief.

B. HRCF Rule 59(e)

Bernardino also argues that she was entitled to relief pursuant to HRCF Rule 59(e). Bernardino contends that she was entitled to HRCF Rule 59(e) relief and reconsideration of the circuit court's Order Confirming Sale/Writ of Ejectment because she did not receive service of U.S. Bank's Complaint and summons. In her opening brief, Bernardino cites to her HRCF Rule 60(b)(4) insufficient service of process argument to support her claim that she was entitled to relief under HRCF Rule 59(e) as well. Because we hold that Bernardino waived her insufficient service of process defense, we need not address her argument within the context of HRCF Rule 59(e).

Bernardino also contends that she was entitled to HRCF Rule 59(e) relief because U.S. Bank's Complaint did not request the circuit court to issue a writ of ejectment. The purpose of a motion for reconsideration made pursuant to HRCF Rule 59(e) "is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 27 (1992). "Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Sousaris v. Miller, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (2000). Bernardino's argument challenging the appropriateness of a writ of ejectment could have and should have been raised in an opposition to U.S. Bank's motion seeking entry of a writ of ejectment. Bernardino failed to oppose U.S. Bank's motion and, therefore, cannot now utilize HRCF Rule 59(e) to raise legal arguments that should have been raised before the

circuit court granted U.S. Bank's request for a writ of ejectment. See Amfac, Inc., 74 Haw. at 114-15, 839 P.2d at 27.

IV. CONCLUSION

Therefore, the "Order Denying Monica E. Bernardino's Motion; HRCF, Rule 59. New Trials; Amendment of Judgment; and From Judgment, Notice of Entry of Judgment Entered; 6/23/2014; and HRCF, Rule 60. Relief from Judgment or Order; From Judgment, Notice of Entry of Judgment Entered 6/13/2012," entered on January 26, 2015 in the Circuit Court of the First Circuit, is affirmed.

DATED: Honolulu, Hawai'i, May 20, 2016.

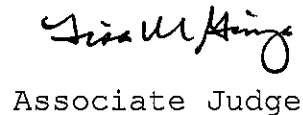
On the briefs:

Monica Ewalani Bernardino
Defendant-Appellant pro se.

Karyn A. Doi
(Leu Okuda & Doi)
for Plaintiff-Appellee.


Presiding Judge


Associate Judge


Associate Judge